No. 89-761

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IN THE

Supreme Court of the United States

October Term, 1989

EDWARD E. RICE,
Petitioner,

vs.

OHIO DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments prohibit state officials from considering political factors in deciding whether to promote a classified public employee into an unclassified position.

2. Whether the First and Fourteenth Amendments prohibit state officials from considering a public employee's own prior personal employment dispute in determining whether to promote the classified public employee into an unclassified position.

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Respondents, David L. Weir and Patrick McCray respectfully request that this court deny the petition for a writ of certiorari ("the Petition") seeking review of the Sixth Circuit's opinion in this case.[1]

[1] The Ohio Department of Transportation is not a party for purposes of the Petition or the appeal before the Sixth Circuit Court of Appeals.

JURISDICTION

This Court has jurisdiction to review the final judgment of the Sixth Circuit Court of Appeals under 28 U.S.C. §1254.

STATEMENT OF THE CASE

Petitioner Edward Rice filed this action against Respondents Weir and McCray on December 23, 1982 alleging that he had been employed at the Ohio Department of Transportation since May, 1969 as a classified employee in the position of Personnel Director III. Petitioner further alleged that on two separate occasions he had requested a temporary work level increase to the position of Administrative Assistant IV. The Administrative Assistant IV position which Petitioner sought is unclassified.

Petitioner asserted claims under 42 U.S.C. §§1983 and 1985 stating that he was denied promotions on the basis of considerations that were in violation of the First and Fourteenth Amendments. Petitioner alleged that he was denied both temporary work level increases because of his age[2], lack of loyalty to the Republican Party of Ohio and for having previously filed a charge of discrimination with the Ohio Civil Rights Commission.[3]

It should be noted that the Petitioner's allegation that both of the employees who received promotions instead of him were either less qualified, or not qualified for the position is erroneous. Since the position of Administrative Assistant IV is unclassified, any determination as to a candidate's qualifications is subjective. The Director, Mr. Weir, not the district deputy director, had total discretion in the selection of the person to be appointed to the position of Administrative Assistant IV.

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[2] Petitioner's age discrimination claim was dismissed by stipulation of the parties and is not before this Court.

[3] Petitioner's charge of reverse sex discrimination which he filed in 1976, was resolved between the parties in 1978.

Petitioner did not allege that he has been discharged, demoted, harassed or punished in any manner because of his lack of loyalty to the Republican Party of Ohio, or for having filed a previous charge of discrimination with the Ohio Civil Rights Commission. Petitioner contends only that he was denied a promotion into the unclassified position of Administrative Assistant IV.

On January 22, 1986 the district court granted the Respondents' Motion for Summary Judgment on the issues of political discrimination and retaliation. On appeal, the Petitioner's sole claim under 42 U.S.C. §1983 was that he was denied promotion to the unclassified position based on political discrimination and retaliation for asserting the reverse discrimination claim.

The Sixth Circuit affirmed the district court's judgment stating that its prior decision in *Messer v. Curci* (en banc), 881 F.2d 219 (6th Cir. 1989) was controlling. In *Messer*, the Court drew a sharp distinction between politically motivated firings and other types of personnel decisions such as failure to hire or rehire based on political considerations.

With respect to the Petitioner's retaliation claim, the Sixth Circuit affirmed summary judgment for the reason that the record did not reveal the existence of a public controversy. The Court stated that the Petitioner's claim was "part and parcel of Mr. Rice's own 'personel employment dispute.' If the First Amendment does not convert every public employee grievance into a matter of public concern, we have been given no reason to suppose that a retaliatory failure to promote Mr. Rice would be unconstitutional" (A-9).[4]

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[4] A copy of the panel opinion is appended to the Petition at A-1, and will be cited herein ("A-[page number]").

REASONS FOR DENYING THE WRIT

I. The Issues Present In This Case Are Not Identical To Those Of *Rutan v. Republican Party of Illinois.*

Petitioner incorrectly asserts that *Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 3185 (October 3, 1989), presents identical questions regarding the promotion issues raised in the instant case. Neither the issues, nor the facts in *Rutan* are identical to those of the instant case. The Ohio General Assembly, in contrast to its Illinois counterpart, has created a statutory distinction between public employment jobs which may be subject to political considerations and those which may not. Ohio Revised Code, Section 124.11 (see Appendix RA1) states:

> The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.
>
> (A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:
>
> . . . .
>
> (9) The deputies and assistants of elective or principal executive officers authorized to act for and in the place of their principals, or holding a fiduciary relation to such principals . . .

No such distinction exists in Illinois. Thus, while the issues raised in *Rutan* may appear to be the same as those raised *sub judice*, they differ greatly because Ohio has recognized statutorily what this Court held:

> Both opinions in *Elrod* recognize that party affiliation may be an acceptable requirement for some types of government employment. Thus, if an

> employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency, [427] U.S. at 366.

Branti v. Finkel, 445 U.S. 507, 517 (1980).

In *Messer*, the Sixth Circuit reiterated this Court's holding:

> The Supreme Court cases do not *require* us to find constitutional fault in a system permitting patronage hiring. The options do lay out a rubric for balancing the cost of patronage in the "restraint it places on freedoms of belief and association," *Elrod*, 427 U.S. at 355, 96 S. Ct. at 2680, with the state interests in effective government. *Id.* at 364, 96 S. Ct. at 2685.

881 F.2d, at 222.

The issue thus presented for review *sub judice* differs materially from those issues stated in *Rutan*. The petitioners in *Rutan* question whether the State can use political considerations to deny a promotion to *any* public employee. Petitioner Rice's claim, however, is limited to a situation where the desired promotion is to an unclassified position which the General Assembly has already determined to be properly subject to political considerations.

II. There Is No Division Between The Courts Of Appeal On The Issue Of Whether The Denial Of A Promotion To An Unclassified Position Due To Political Beliefs Or Political Affiliation Violates First Amendment Rights.

Petitioner's claim (Petition at 9) that the Courts of Appeal are sharply divided as to whether a denial of promotion due to political beliefs and political affiliation violates First Amendment rights is also erroneous. Petitioner cites no circuit court case which has addressed the issue of the constitutionality of a denial of a promotion due to political beliefs or affiliation other than *Rutan*. Indeed, the Seventh Circuit's decision in *Rutan*, by Petitioner's own admission, is consistent with the Sixth Circuit's analysis of the issue in the case *sub judice*.

The other cases cited by Petitioner involve issues which differ significantly from those raised by Petitioner. In *Bennis v. Gable*, 823 F.2d 723 (3rd Cir. 1987), the plaintiffs claimed that they were demoted in retaliation for their support of a Mayor's political opponent. In *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), the court addressed whether a police officer could be demoted for "intemperately criticizing the police chief in front of another police officer while off duty." *Id.* at 834. In *Lieberman v. Reisman*, 857 F.2d 896, 898 (2d Cir. 1988), the plaintiff claimed that she was denied payment for compensatory time and vacation solely due to her political affiliation.

Each of the cases which Petitioner cites as being in conflict with the Sixth Circuit determination herein, asserts a claim based on some type of retaliation which results from a public employee expressing political beliefs different from his public employer; and address

whether a public employer may impose punishment or retribution for the exercise of permissible free speech. They do not address whether promotion into the unclassified service based in part on political considerations violates the First and Fourteenth Amendments.

Petitioner Rice makes no claim that he did not receive a promotion in retribution for political expressions or political statements which were at odds with Respondents' political beliefs. To the contrary, Petitioner Rice was a member of the *same* political party as Respondents.

III. The Sixth Circuit's Decision Does Not Conflict With The Holding Of The Eighth Circuit In *Greenwood v. Ross.*

Petitioner states that the Sixth Circuit's decision is in direct conflict with the Eighth Circuit's holding in *Greenwood v. Ross,* 778 F.2d 448 (8th Cir. 1985). It is not. In *Greenwood,* the plaintiff claimed that he was discharged in retaliation for filing an EEOC claim. Petitioner Rice makes no claim that he was discharged in retaliation for filing his charge of discrimination.

Moreover, the analysis of the Sixth Circuit is in accord with the prior decisions of this Court:

> The threshold question in such cases, as the Supreme Court has recently emphasized, is whether the speech involves a matter of "public concern." *Connick v. Meyers,* 461 U.S. 138, 146 (1983); *Rankin v. McPherson,* 483 U.S. 378, 384 (1987); see also *Brown v. City of Trenton,* 867 F.2d 318, 321 (6th Cir. 1989). If the speech does not involve a matter of public concern, it is "unnecessary for us to scrutinize" the employment decision. *Connick,* 461 U.S. at 138. Not every job-related grievance of a public employee is a matter of public concern. In *Connick,* for example, the issues raised by the plaintiff's circulation of a questionnaire among her co-workers were "mere extensions of [the plaintiff's] dispute over her transfer" to another position, not issues of broader interest to society at large. *Id.* at 148. (A-7).

Petitioner Rice, similarly, fails to provide any information to distinguish his reverse discrimination charge from any other single-plaintiff discrimination case. Petitioner made his claim to benefit only himself. No attempt or effort was made to make the alleged discriminatory conduct anything other than a "personal employment dispute." As the Sixth Circuit concluded,

"If the First Amendment does not convert every public employee grievance into a matter of public concern, we have been given no reason to suppose that a retaliatory failure to promote Mr. Rice would be unconstitutional." (A-9).

CONCLUSION

For the foregoing reason, the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

OHIO REVISED CODE

§124.11 Unclassified and classified service.

The civil service of the state and the several counties, cities, civil service townships, city health districts, general health districts, and city school districts thereof shall be divided into the unclassified service and the classified service.

(A) The unclassified service shall comprise the following positions, which shall not be included in the classified service, and which shall be exempt from all examinations required by this chapter:

(1) All officers elected by popular vote or persons appointed to fill vacancies in such offices;

(2) All election officers and the employees appointed by boards of elections;

(3) The members of all boards and commissions, and heads of principal departments, boards, and commissions appointed by the governor or by and with his consent; and the members of all boards and commissions and all heads of departments appointed by the mayor, or, if there is no mayor such other similar chief appointing authority of any city or city school district; except as otherwise provided in division (A)(17) or (C) of this section, this chapter does not exempt the chiefs of police departments and chiefs of fire departments of cities or civil service townships from the competitive classified service;

(4) The members of county or district licensing boards or commissions and boards of revision, and deputy county auditors;

(5) All officers and employees elected or appointed by either or both branches of the general assembly, and such employees of the city legislative authority as are engaged in legislative duties;

(6) All commissioned and noncommissioned officers and enlisted men in the military service of the state including military appointees in the office of the adjutant general;

(7)(a) All presidents, business managers, administrative officers, superintendents, assistant superintendents, principals, deans, assistant deans, instructors, teachers, and such employees as are engaged in educational or research duties connected with the public school system, colleges, and universities, as determined by the governing body of the public school system, colleges, and universities;

(b) The library staff of any library in the state supported wholly or in part at public expense.

(8) Three secretaries, assistants, or clerks and one personal stenographer for each of the elective state officers; and two secretaries, assistants, or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards, or commissions, except civil service commissions, authorized to appoint such secretary, assistant, or clerk and stenographer;

(9) The deputies and assistants of elective or principal executive officers authorized to act for and in place of their principals, or holding a fiduciary relation to such principals and those persons employed by and directly responsible to elected county officials and holding a fiduciary or administrative relationship to such elected county officials, and the employees of such

county officials whose fitness would be impracticable to determine by competitive examination, provided that this subdivision shall not affect those persons in county employment in the classified service as of September 19, 1961. Nothing in this subdivision applies to any position in a county department of human services created pursuant to sections 329.01 to 329.10 of the Revised Code.

(10) Bailiffs, constables, official stenographers, and commissioners of courts of record, deputies of clerks of the courts of common pleas who supervise, or who handle public moneys or secured documents, and such officers and employees of courts of record and such deputies of clerks of the courts of common pleas as the director of administrative services finds it impracticable to determine their fitness by competitive examination;

(11) Assistants to the attorney general, special counsel appointed or employed by the attorney general, assistants to county prosecuting attorneys, and assistants to city directors of law;

(12) Such teachers and employees in the agricultural experiment stations; such students in normal schools, colleges, and universities of the state who are employed by the state or a political subdivision of the state in student or intern classifications; and such unskilled labor positions as the director of administrative services or any municipal civil service commission may find it impracticable to include in the competitive classified service; provided such exemptions shall be by order of the commission or the director, duly entered on the record of the commission or the director with the reasons for each such exemption;

(13) Any physician or dentist who is a full-time employee of the department of mental health or the department of mental retardation and developmental disabilities or of an institution under the jurisdiction of either department; and physicians who are in residency programs at the institutions;

(14) Up to twenty positions at each institution under the jurisdiction of the department of mental health or the department of mental retardation and developmental disabilities that the department director determines to be primarily administrative or managerial; and up to fifteen positions in any division of either department, excluding administrative assistants to the director and division chiefs, which are within the immediate staff of a division chief and which the director determines to be primarily and distinctively administrative and managerial;

(15) Noncitizens of the United States employed by the state, or its counties or cities, as physicians or nurses who are duly licensed to practice their respective professions under the laws of Ohio, or medical assistants, in mental, tuberculosis, or chronic disease hospitals, or institutions;

(16) Employees of the governor's office;

(17) Fire chiefs and chiefs of police in civil service townships appointed by boards of township trustees under section 505.38 or 505.49 of the Revised Code;

(18) Executive directors, deputy directors, and program directors employed by community mental health boards under Chapter 340, of the Revised Code, and secretaries of the executive directors, deputy directors, and program directors;

(19) Superintendents, and management employees as defined in section 5126.20 of the Revised Code, of county boards of mental retardation and developmental disabilities;

(20) Physicians, nurses, and other employees of a county hospital who are appointed pursuant to sections 339.03 and 339.06 of the Revised Code;

(21) Inspection officers of coal and surface mining operations designated under section 1513.03 of the Revised Code;

(22) The executive director of the state medical board, who is appointed pursuant to division (B) of section 4731.05 of the Revised Code;

(23) County directors of human services as provided in section 329.02 of the Revised Code.

(B) The classified service shall comprise all persons in the employ of the state and the several counties, cities, city health districts, general health districts, and city school districts thereof, not specifically included in the unclassified service. Upon the creation by the board of trustees of a civil service township civil service commission, the classified service shall also comprise, except as otherwise provided in division (A)(17) or (C) of this section, all persons in the employ of civil service township police or fire departments having ten or more full-time paid employees. The classified service consists of two classes, which shall be designated as the competitive class and the unskilled labor class.

(1) The competitive class shall include all positions and employments in the state and the counties, cities, city health districts, general health districts, and city

school districts thereof, and upon the creation by the board of trustees of a civil service township of a township civil service commission all positions in civil service township police or fire departments having ten or more full-time paid employees, for which it is practicable to determine the merit and fitness of applicants by competitive examinations. Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, reinstatement, transfer, or reduction, as provided in this chapter, and the rules of the director of administrative services, by appointment from those certified to the appointing officer in accordance with this chapter.

(2) The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the director. The director or the commission shall in his rules require an applicant for registration in the labor class to furnish such evidence or take such tests as the director considers proper with respect to age, residence, physical condition, ability to labor, honesty, sobriety, industry, capacity, and experience in the work or employment for which he applies. Laborers who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought, and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. Upon the request of an appointing officer, stating the kind of labor needed, the pay and probable length of employment, and the number to be employed, the director shall certify from the highest on the list, double the number to be employed, from which the appointing officer shall appoint the number actually needed for the particular work. In the event of more than one applicant

receiving the same rating, priority in time of application shall determine the order in which their names shall be certified for appointment.

(C) A municipal or civil service township civil service commission may place volunteer firemen who are paid on a fee-for-service basis in either the classified or the unclassified civil service.